PATENT APPLICATION

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE

In re application of **Joseph HARBAUGH**	Confirmation No.: **4205**
Application No.: **09/826,690**	Examiner: **CASLER, Traci L.**
Filed: **April 5, 2001**	Group Art Unit: **3629**
Attorney Docket No.: **6994-1**	Customer Number: **30448**

For: **METHOD FOR ADMITTING AN ADMISSIONS APPLICANT INTO AN ACADEMIC INSTITUTION**

DECLARATION UNDER 37 C.F.R. §1.132 BY JOSEPH D. HARBAUGH

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Commissioner for Patents
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I. Joseph D. Harbaugh, do declare:

1. I am the inventor of the subject matter claimed in the above-captioned application ("the Application").

2. I hold a Bachelor of Science degree from St. Joseph's College. a LL.B. degree from the University of Pittsburgh. and an LL.M. degree from Georgetown University. I began my legal career in public service. including serving as a Chief Public Defender (Connecticut), Special Assistant Chief Prosecuting Attorney for Organized Crime (Connecticut), and Special Assistant to Congressman William J. Green of Pennsylvania. Beginning in 1968, I have been continuously employed as a law school professor, law school Dean, or both. From 1987 through 1995, I was Dean and Professor of Law at the University of Richmond. an ABA/AALS

accredited law school with 450 full-time students. Since 1995, I have served as Dean and Professor of Law at the Nova Southeastern University Law Center ("Nova Law Center"), an ABA/AALS accredited law school with 1,000 full- and part-time students. During my tenure as Dean at both institutions, I worked closely with admissions officers on initiatives that resulted in significantly increased minority enrollment and retention.

3. I have reviewed the non-final Office Action mailed May 22, 2008 (hereinafter "Office Action") and the assertions therein, as well as the cited references. In the Office Action, claims 23-44 were rejected under 35 U.S.C. § 103(a) as being obvious over Karen Arenson, "Opponents of Change in CUNY Admissions Policy Helped Pass a Compromise Plan," NEW YORK TIMES (Nov. 24, 1999) (hereinafter "CUNY") in view of www.gradcollege.swt.edu (hereinafter "Grad College"). It is my firm opinion that a person of ordinary skill in the art of graduate school admissions would not modify the cited references in order to develop the claimed method. That said, I have been advised to limit my declaration to issues related to objective evidence of nonobviousness. In particular, this Declaration will address commercial success, long-felt but unsolved needs, failure of others, and unexpected results, as they relate to the claimed subject matter.

As background, it is important to understand that those involved in graduate admissions, including law school admissions, long ago noticed that standardized tests and undergraduate grade point averages are not necessarily predictive of how an individual student will perform once admitted to a graduate school. This knowledge of those skilled in the art was articulated by

no less an expert than Dr. Philip D. Shelton, then President and Executive Director of the Law School Admission Council (LSAC), the organization that produces and administers the Law School Admissions Test (LSAT), the best standardized test in the admissions testing industry. *See* Affidavit of Philip D. Shelton submitted August 24, 2005 (hereinafter "Shelton Declaration").

Each particular score on a standardized test represents a bell curve distribution of graduate school academic performance and neither the LSAT, nor any other standardized test offered prior to the filing of the instant application, was or is capable of identifying where on that curve an individual student would fall if admitted to a graduate school. As explained by Dr. Shelton:

> In fact, a better way to look at a particular score is to see it as the mid-point (the mode) on a bell curve of 100 students achieving that particular score. The bell curve's horizontal axis represents the range of LSAT scores (from 120-180) and the vertical axis represents how many of the aforementioned 100 test takers will exhibit equivalent law school performance to test takers that achieved the score indicated by the horizontal axis. The bell curve tells us that out of 100 persons with a particular score, a predictable number will perform better than persons at much higher scores. However, nothing about the test permits us to determine where an individual will fall on this bell curve.

For example, it is known that, once admitted to law school, almost 40% of students with LSAT scores of 145 (27th percentile) will outperform students with LSAT scores of 155 (67th percentile). However, there is simply no means of predicting which 40% of the students scoring a 145 will exhibit this elevated level of performance in law school. *See* P. Shelton, "LSAT: Good – But Not That Good," LAW SERVICES REPORTER, Sept./Oct. 1997 at 2. Similarly, more than one-fourth of students scoring 140 (15th percentile) on the LSAT will match or surpass the

first year academic achievement of half of those who scored a 160 (83rd percentile) on the LSAT. The LSAT is the most predictive test in the standardized testing industry, so this issue is even more problematic when other, less predictive, standardized tests are employed.

In recognition of this problem, graduate schools and standardized test providers have committed substantial resources in unsuccessful attempts to identify a solution to this problem. As noted by Dr. Shelton, "The LSAC has conducted extensive research over many years, however, no single variable or combination of variables has been identified that allows a law school admission office to consistently identify 'diamonds in the rough.'" Thus, when the instant application was filed there was a substantial need for some method of determining which students would perform at the high end of the bell curve represented by their particular standardized test score. Nearly seven years after Nova Law Center began implementing the claimed method, it is clear that, despite the failure of the best minds in the standardized testing industry, the claimed method satisfies this long-felt, but unsolved need. A direct result of this break through result is commercial success in the form of existing and potential license revenue for use of the claimed method.

4. The Shepard Broad Law Center at Nova Southeastern University ("Nova Law Center") implemented the claimed admissions method in the Fall of 2001. Since the claimed method was implemented, there have been 572 students admitted to the Nova Law Center through the program. Of those, 95.45% have either graduated or are currently enrolled at the

Nova Law Center. This compares favorably with the 90.4% attrition rate for the 1740 students admitted through regular admissions during the same period.

Since implementation, the claimed method has been used to identify students with substantially lower LSAT scores who will perform well once admitted to the Nova Law Center. The following chart shows the average LSAT scores and average first year GPA (1L GPA) for students admitted through both programs for the period from 2001 to 2007.

	Claimed Method	Regular Admission
Avg. LSAT	142	151
Avg. 1L GPA	2.54	2.61

To place these values in context, the average LSAT score of regularly admitted students places them in the top half of all test takers. while the average LSAT score of students admitted through the claimed method places them in the bottom 20% of all test takers. In contrast to these expectations, the 1L GPA values are comparable between the two.

More strikingly, starting in 2004, the program was modified to adjust the standards for admission to reflect final exam grades achieved by regularly admitted students who had successfully completed the first year of law school. During the 2004-2007 timeframe, the LSAT scores remained essentially constant, but the 1L GPAs increased substantially for the students admitted through the claimed method. The following chart shows the average LSAT scores and average first year GPA (1L GPA) for students admitted through both programs for the period from 2004 to 2007.

	Claimed Method	Regular Admission
Avg. LSAT	142	151
Avg. 1L GPA	2.59	2.61

The data from 2004 to 2007 clearly demonstrates that the claimed method is capable of identifying the high performing test takers from a group of low scoring test takers. In fact, given the variability in both groups, the performance of students admitted through the claimed method and through regular admissions are essentially identical. This is true even though the students admitted through the claimed method scored on average more than thirty percentile points lower than those admitted through Nova Law Center's regular admissions program. Thus, it is clear that the claimed method of admissions successfully identifies students performing at the high end of the bell curve represented by their LSAT score. This is an unexpected result and an unequivocal success where others have failed, especially considering all of the resources expended by standardized testing organizations attempting to obtain this result of the claimed method.

5. In 2001, the subject matter of the claims was implemented by the Shepard Broad Law Center at Nova Southeastern University (the "Nova Law Center"). Shortly thereafter, the Nova Law Center began licensing the claimed methodology to numerous law schools including, New York Law School, Florida Coastal Law School, Albany Law School, and the University of LaVerne College of Law. As the prior art methods are in the public domain for free, these law schools chose to license the claimed methodology because of the features that distinguish it from the prior art.

The license revenue generated to date is at least $285,000. In order to place this figure in context, it is important to recognize that the Nova Law Center is a law school and is not in the

business of licensing admissions programs. In fact, the Nova Law Center has no formal marketing or sales program in place for licensing the claimed method. Thus, the $285,000 in revenue and the number of law schools licensing the program is reflective of the merits of the claimed method. word of mouth, and the fact that the claimed method successfully fills a much needed gap in conventional admissions methods.

In particular, there is an emerging recognition among graduate educators that education is enhanced when students are immersed in a diverse, high-performing student population. It is also well documented that there is a level of cultural bias inherent in the standardized tests currently used for graduate admissions. In order to produce the desired diverse, high-performing student population, graduate educators and test designers have endeavored to eliminate the cultural bias from standardized tests. To date, cultural bias has not been eliminated from standardized tests.

The issue of how to develop a diverse, high-performing student population was the issue before the U.S. Supreme Court in *Grutter v. Bollinger*, 539 U.S. 306 (2003). In *Grutter*, the University of Michigan Law School ("UMLS") determined, "based on its experience and expertise. that a 'critical mass' of underrepresented minorities is necessary to further its compelling interest in securing the educational benefits of a diverse student body." *Grutter*, 539 U.S. at 333. Thus, the UMLS began considering race as one or a number of factors for making admissions decisions. The issue in *Grutter* was whether UMLS's admissions plan was constitutional. In order to pass constitutional scrutiny, the UMLS admissions plan needed to meet the requirements of narrow tailoring. including serious consideration of race-neutral

alternatives. *See id.* Ultimately the Supreme Court determined that UMLS's admissions plan survived strict scrutiny and were constitutional. Although the Supreme Court ruled in favor of UMLS, there is still concern in the graduate school community, and law school community in particular, regarding what constitutes "serious consideration of race-neutral alternatives."

Thus, while race may be taken into account, serious consideration must be given to race-neutral alternatives for eliminating cultural bias and developing a diverse, high-performing student population. Thus, another aspect of the financial success of the claimed admissions method is the desire among law school deans and admissions officers to develop a diverse, high-performing student population. In addition to the licensing revenue, the Nova Law Center has been approached by others seeking to purchase or exclusively license the claimed admission method in order to market the claimed method to the entire law school community. While nothing has been finalized, these negotiations are on-going. Based on my conversations with individuals involved in licensing the claimed method from the Nova Law Center, the commercial success and commercial interest to date is based solely on features that distinguish the claimed method from the cited references and other similar programs.

6. In conclusion, it is my opinion that the information supplied herein clearly demonstrates (i) that the claimed method has achieved commercial success as a direct result of inventive features of the claimed method: (ii) that the claimed method solve a long-felt, but unresolved need, in the art of graduate school admissions; and (iii) that the claimed method provides an admissions method that, quite unexpectedly, is capable of better identifying students

who will perform well at a graduate school than other known techniques,. It is also my opinion that the combination of CUNY and Grad College neither discloses nor suggests the claimed method for admission to a graduate school.

7. I further state that all statements made herein of my own knowledge are true and that all statements made on information and belief are believed to be true; and further that these statements were made with my knowledge that willful false statements and the like so made are punishable by fine or imprisonment, or both, under §1001 of Title 18 of the United States Code, and that such willful false statements may jeopardize the validity of the application or any patent issued thereon.

Date: 12-31-08

Joseph D. Harbaugh